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ESSAY

ON THE

RIGHTS

OF THE

PRINCE OF WALES,

RELATIVE TO THE

DUTCHY OF CORNWALL.

By G. MOORE, Esq.

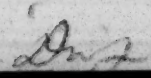
OF THE HONOURABLE SOCIETY OF LINCOLN'S INN.



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E S S A Y, &c.

THE recent application of the Prince of Wales to Parliament, for the payment of his debts, has given rise to a good deal of discussion and debate. As far as political considerations form any part of the arguments on one side or the other, the Author of the following sheets is silent. It is not his province to dissect the plans of great statesmen, and pronounce upon their absolute or comparative merits. He has undertaken a more humble task—To submit to the judgment of those who indulge any curiosity upon such matters, what has occurred to him, in the course of his professional reading, upon a few points of mere forensic discussion, which have arisen collaterally to other questions of

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more

more extensive and momentous concern. These have already exercised the ingenuity, and provoked the erudition, of some of the first law officers of the crown. The Author laments that he was not present when they delivered their argued opinions in Parliament. Through the medium of newspaper reports, he can see but darkly and indistinctly. Had he had the benefit of the learning of the Attorney General, and the acuteness of Mr. Grant, he would probably have been corrected, where he happens to differ from them; and would have obtained new grounds and reasons of assent, where it is his good fortune to concur. As he stands at present so far from knowing the arguments whereby they supported their opinions, he is not distinctly apprized what those opinions were, specifically, upon each disputed point. He knows it only loosely and undeterminately from hearsay, or from authority equally dubious, the vague relations of unlearned reporters. If in any part, therefore, of this Essay, he happens to be mistaken in what he understands to be the delivered sentiments of any public man, he hopes,

hopes, that the account he has given of his means of knowledge, will plead his excuse.

A pamphlet has already appeared upon this subject by a gentleman of the name of Nicholls. —The Author of the following Essay would not provoke too severe a scrutiny into his own merits, by wantonly detracting from those of his forerunner in the same path of discussion: but he cannot help observing, that the work in question is more distinguished for clear luminous statement, than for extent of research, or accuracy of knowledge. It is perhaps clear, because it is superficial; and easily understood because it says little. It is chiefly made up of scanty gleanings from the Prince's case*. But little farther seems the pamphlet writer to have extended his investigations. From most of his positions the Author feels himself compelled to dissent. He hopes he shall not dissent from him with petulance—The Public must decide whether he dissents from him with knowledge.

* 8 Co. from p. 1 to p. 32.

THE eldest, or first-born son of a king of England, heir apparent to the crown, *primogenitus filius regum Angliæ in regno Angliæ hereditariè successurus*, is seised of various lands, tenements, and hereditaments, as of the dutchy of Cornwall, under the name and honour of Duke of Cornwall; by reason of a charter made with the authority of Parliament by Edward III. in the 11th year of his reign, to Edward, Prince of Wales, commonly known by the name of The Black Prince. This charter is the foundation of the title which became vested in the present Prince of Wales, at his birth, to the property in question.

Upon the construction of this act three principal questions have arisen :

I. What kind, quantity, or quality of estate, it conveys to the persons entitled under it ?

II. Who are the persons entitled under it ?

III. Whe-

III. Whether or not the King is accountable for the rents and profits of the dutchy of Cornwall, received by him during the minority of the Duke?

A fourth naturally introduces itself as a sequel to the third.

IV. Supposing the King to be accountable, what would be the proper method of suit in this case?

The word estate, in its true, precise, legal acceptation, signifies the degree or specific quantity of interest possessed by the holder of any thing in the thing holden.

The largest degree of interest which can be possessed in any object of dominion, or property, as forming a head in the nomenclature of estates, known to the law of England, is an estate in fee simple. From this point downwards there is a series of general heads, or designations, corresponding to a scale of diminishing interests,

reaching to the flightest and frailest estate that can be possessed—an estate or interest determinable at will.

Each of these general heads, or divisions of estate, has its modes, properties, and qualities, which determine its nature, and make it what it is. No particular individual estate can be said to fall under a specific head, which has properties and qualities foreign from that head. Thus it is evident that an estate which is confined in its descent to a certain description of heirs, cannot with propriety be called an estate in fee simple, which excludes that property of limitation and circumscription.

Every particular estate, created by any authority short of an act of Parliament, must come under one of the general heads established by the law of England. It must have all the properties appertaining to one in the series, without either redundancy or deficiency. Should any individual endeavour to create a new and anomalous estate, either the conveyance would be
entirely

entirely void, or construction would by extension or limitation reduce it into regularity. But Parliament is omnipotent; and we must follow it, however devious its operations. Should there be question about a particular estate created by this pre-eminent authority, which either by redundancy or deficiency was clearly distinguishable from every head under which estates are classed by our code of landed property—in every part of the series less than the degree above, and larger than the one below, and derogating at the same time from those general rules and principles which are applicable to all—It should seem but a display of idle dexterity to endeavour to reduce what was in its nature devious, or classify what was in its nature anomalous.

This I apprehend to be the case of the particular estate which we have to consider. It is such an one, as nothing less than an act of Parliament could have created. It has successively undergone almost every name, by which estates of freehold are distinguished in our system of juris-

prudence ;—a pretty sure sign that they are all equally inapplicable to it. It has been termed a fee simple, a base or qualified fee, a fee tail, an estate for life. I shall endeavour to shew that it does not properly fall under any one of these several heads. But it will be fit in the first place to recite the words of the grant.

The office of the *habendum* is to limit the certainty of the estate. The *habendum*, joined with the *tenendum*, and several times repeated in the charter, in respect of the different members and particulars of the property granted, is in these terms : *Habendum & tenendum eidem duci & ipsius & heredum suorum regum Angliæ filiis primogenitis & dicti loci ducibus in regno Angliæ hereditariè successuris*. Here follows the interpretation of Sir Edward Coke :* “ So that he who ought to inherit by force of this grant, ought to be the first-begotten son and heir apparent of the King of England ; and of such King as is heir to Prince Edward ; and such first-begotten son and heir apparent shall inherit the said dukedom, in

* 8 Co. 16. a. P. Case.

the life-time of the King his father." There is besides in this parliamentary charter the following special clause and provision: *Ita quod prefato duce seu aliis ejusdem loci ducibus decedentibus & filio seu filiis ad quos dictus ducatus prætextu doni & concessionis nostrorum prædictorum spectare dignoscitur tunc non apparentibus, idem ducatus cum castris, burgis, villis, &c. ad nos vel hæredes nostros reges Angliæ revertatur, in maribus nostris & ipsorum hæredum nostrorum regum Angliæ, &c.* Here is an estate created in departure from many of the rules and principles of the common law; for, 1. If lands be given to the son, and to his heirs of the body of his father, the son cannot take as heir of the body of his father; because the grant is to him and to his heirs.* 2. *Nemo est hæres viventis.* 3. The clause whereby the estate created is made subject to eventual extinctions and renovations, is a clause entirely *sui generis*; which would not be good under any other authority but that of Parliament. It seems, indeed,† that a rent newly granted, may be made to cease for a time, as during the nonage of the grantee, to revive again

* Co. Litt. 27. a.

† 1 Co. 87. Plowd. 156.

upon his being of full age; but land, which is of a more solid nature, and to which another may have an ancient right, cannot be subjected to such appointments.* Lord Coke expressly asserts the anomalous character of this estate; for he argues that the charter creating the estate must have the force of an act of Parliament, since nothing short of such an authority could create such an estate. But I proceed to consider the several kinds of estate known at common law, to which the present can be supposed to bear any conformity; and shall shew, if I mistake not, that they all differ from it in essential qualities and properties. 1. A Fee-simple. This is a *pure* inheritance,† that is, descendible to all the heirs of the tenant, without limitation or restriction. Now in the instance before us there is a very material limitation and restriction. Heir to the last duke, or heir to the original grantee, does not of itself make a title under the charter. There must be superadded first-born son of the King, and heir of the crown of England. In the first place, then, all females

* 8 Co. 17.

† Litt. f. 1.

are excluded. In the next, all males not answering a particular description. Power of alienation is essential to fee-simple.* Every condition contrary to it is void. In this case not only the whole dutchy, which being an honour, and having therefore an incorporeal hereditament of the highest dignity annexed to it, might be considered as unalienable, without the King's licence† under the general rule that seems to have prevailed respecting honours; but by a special clause and proviso of the act, every part and parcel of the ducal possessions is made untransferrable, and every individual in the nation out of the particular line of persons marked out, is disqualified from being seised of an estate of inheritance in any of them.

There

* Litt. f. 360. Co. 223.

† It does not appear that the statute 1 *Edw.* 3. c. 12. which enables tenants *in capite* to alienate their lands upon paying a reasonable fine to the King, extends so far as to authorize the transfer of a whole honour with the incorporeal hereditament annexed to it. But certainly there is nothing in the nature of an honour to restrain the alienation of particular parts and parcels of the privileged possessions. Alienations of this kind
seem

There can be no reversion upon a fee-simple. Yet the words of the clause in favour of the crown are *idem ducatus, &c. revertatur, &c.*

Base or qualified fees. It has been contended that the dutchy of Cornwall comes under this head. Plowden* and Coke† divide this kind of estate into two sorts. Coke reckons, 1. Estates created by limitation upon a fee-simple, as to A. and his heirs, as long as B. has heirs of his body. Under this head fall all other fees with limitations annexed to them. As to A. and his heirs, tenants of the manor of Dale. Blackstone gives this instance under what he calls base or qualified fees. In Plowden this division of cases is deno-

seem to have been made at all times precisely in the same manner as of other lands and tenements. Lord Hardwick recognizes the principle that honours are subject to severance and division. 1. *Ves.* 449. Besides there is this further particularity in the dutchy of Cornwall, that as its possessions are declared inseparable by act of Parliament, not even the King's licence, which it is acknowledged would make good the disposition of any other honour, even in the entirety, would, I apprehend, be effectual to ratify the disannexation of the least member of the estate in question.

* Plow. 557.

† 10. Co. 97. b. Seymor's Case.

minated determinable fees, as distinguished from base fees, the second head in his arrangement. These base fees of Plowden coincide with Sir Edward Coke's implicit fees derived out of estates tail. Examples: An estate tail forfeited to the crown. The lord enters upon the estate tail of a villain. Tenant in tail bargains, and sells by deed enrolled, and levies fines with proclamations. Other cases of the same kind are scattered in the books. These two heads or classes differ in some particulars, as in this, that according to Coke no reversion in contemplation of law lies upon the first, neither can a remainder be limited upon them. In the second he admits the legal existence of both. Other minute distinctions might be pointed out; but it is more to our purpose to remark in what they agree. First, In their most material properties they are fees simple, and are accordingly reckoned under this general name. In Littleton* we find this syllogism: Every estate of freehold must either be fee simple, tail, for a man's own life, or another's. It is neither the first, second, or fourth, therefore, &c. The same argument is

* Litt. f. 380, 381.

made use of in Plowden.* Coke† observes, that they are considered as ample and great estates, as pure fees though not as perdurable. Accordingly the powers of the tenants were the same. They could alien and lease in the same manner, and by the same instruments, except only that whatever transfers or modifications the qualified fees underwent, they were liable to determine (with a saving to dower and curtesy in most cases) upon the contingency happening, which by their very constitution was the period of their duration.

In treating of limited fees, I have described fees upon condition as far as they regard this subject. There is no colour for likening the estate we are contemplating either to fees conditional, before the statute *de donis*, or fees limited under the statute of uses: I therefore pass over these descriptions of fees, and come to a kind of estate which, though not properly a qualified fee, yet being a fee, and differing in a very important particular from a fee-simple, may be

* Plow. 562.

† Co. Litt. 18. a.

considered

considered as bearing some analogy to it. I mean an estate of succession, vested in a corporation, whether sole or aggregate. It differs in a very important particular from a fee-simple, according to the doctrine of Sir Edward Coke,* since on the dissolution of the body corporate, to whom it is limited, which is analogous to the failure of heirs in an ordinary estate of inheritance, it does not go to the lord by escheat, but returns to the grantor by reversion. Of consequence it is not like a fee-simple the *whole* of an estate in contemplation of law. But first, corporations acting in due form and solemnity, all persons concurring, whose concurrence the law made requisite, could before the restraining statutes of Elizabeth, alien in fee-simple, or carve out any inferior estate, without stint or limitation of time. Secondly, at every period since the statutes, they could, regard being had to every necessary condition, let leases for three lives or twenty-one years.

I have gone through this enumeration and course of argument, to shew that the estate of

* Co. Litt. 13. b.

the Duke of Cornwall is not qualified as estates qualified at common law, are qualified. No doubt, in a strict etymological sense, it may be called a qualified fee; but so it may be called an estate tail. How does Mr. Nicholls shew that it is not an estate tail? by shewing that it is not taillé, or docked, upon the principle on which all estates tail are taillé or docked; namely by confining the descent with more or less strictness to the lineal heirs of the grantee. I only pursue the principle of his reasoning in contending that it is not a base, or qualified, or determinable fee-simple. In addition to his arguments against its being an estate tail, I beg leave to urge this. The 32 *Hen.* 8. c. 28. enables all tenants in tail to make leases binding on their issue, for the same term to which corporations were afterwards restrained. 21 *Jac.* c. 29. was enacted empowering the Duke of Cornwall to do what all tenants in tail had already the power of doing. I need not evolve this proof. The conclusion must leap up to the eyes of every reader. This likewise will explain my last observation respecting the power of corporations.

Mr.

Mr. Attorney General is said to have declared it an estate for life. With all due deference to so grave an authority, and with the strongest feeling of diffidence in dissenting from him, I beg leave to make these observations :

1. The grant is, to Prince Edward, and the first-born sons of the Kings of England, being heirs to the said Prince. So that to make a title under the charter, a man must not only be first-born son of a King of England, but thro' that King heir to the last Duke, and the original grantee.
2. Sir Edward Coke, and the judges whose solemn decision he reports, consider it as an estate of inheritance. He expressly calls it so, and it is so named in a variety of records to which he refers.
3. Selden says that no letters patent of creation are necessary in respect of the title of Duke of Cornwall ; for the first-born son is born *heir**.
4. It appears by the roll of Parliament (50 *Edw.* 3.) that the widow of the Black Prince was endowed. The late Princess of Wales had a composition allowed her, which

* Tit. Hon. 598, 599.

may be deemed an acknowledgment of title. In the act of last session there is a special clause to bar the present Princesses*.

All my observations on this part of the subject are, I think, confirmed by the words of the 21 Jac. c. 29.

In most humble wise beseecheth your Majesty, your, &c. Charles Prince of Wales, Duke of Cornwall, &c. that whereas your said suppliant is seised of the said dukedom of Cornwall, &c. of a state of inheritance under a *special form of limitation, differing from the ordinary rules of inheritance at the common law*, whereupon some questions do grow whether leases made by your said suppliant of any manors, &c. should be good longer than your suppliant's life. It is ordained and established, &c.

* If it were an estate for life, each successive Duke would take as purchaser; consequently it is clear the King could not be guardian in chivalry: yet Mr. Attorney General is said to have founded the King's claim upon that kind of guardianship. This makes me apprehend some mistake in the report of his opinions. *Co. Litt.* 76. a.

It

It appears clearly, from this preamble, that the estate of the Duke of Cornwall is an estate of inheritance, but it is an inheritance wholly anomalous, created by limitations peculiar to the deed under which it subsists. This being the case, we may indeed say that every Duke of Cornwall takes as *heir*, but it would be unsafe to conclude that the person standing next in the order of inheritance has only a *possibility*, and not an *interest*. The heir apparent of a tenant in fee simple has no doubt only a *possibility*, which he cannot make the subject of a conveyance. But it ought to be remarked, that the ancestor has an unlimited power of alienation in this case. A Duke of Cornwall is wholly without such a power. This distinction surely is important. In truth, general rules and general names cannot well be applied to an estate so peculiarly circumstanced as that which we have been contemplating.

So far for the estate of the Duke of Cornwall.

2nd Question. Who shall be Duke of Cornwall?

This question admits at present of scarcely any doubt. It is clear, 1. That all females are excluded. 2. All who are not actually sons of a King of England then living. Thus it has been determined that grandchildren are not within the scope of the grant. But, 3. It is equally clear, that all the sons in their order upon the decease of their elders without issue, are entitled to the honour and possessions in question. It is true, Sir Edward Coke mentions an *observation* to have been made in the Prince's case contrary to this latter proposition; and upon the ground of this observation Mr. Nicholls boldly denies the doctrine. The observation would, in other circumstances, have no doubt considerable weight; particularly as it appears to have coincided, at the time at least when it was made, with the opinion of the very eminent judge who reports it. But Mr. Nicholls does not seem to have been aware, that ten years after

after the Prince's case, upon the death of Henry, eldest son born of James I. the point came to be solemnly argued before the King in Council, assisted by the Master of the Rolls and his Majesty's counsel learned in the law. A report of the argument, and consequent resolution of the Council, was published by authority. Sir J. Davies was, I believe, the pen employed for the purpose. It is given at length in Coll. Proceed. on Claims of Baron *.

The decision was, that Prince Charles was entitled to the honour and ducal possessions, upon a fair construction of the grant of Edward III. and agreeably to former precedents, as well as divers analogies of law. It is remarkable that Sir Edward Coke founds himself entirely on an assertion that Henry, afterwards Henry the VIIIth, was not recognized Duke of Cornwall by inheritance, after the death of his brother Prince Arthur. Now the reader has only to look into the above-

* 148 to 159.

mentioned report, and he will find the contrary of this supposed fact undeniably proved by reference to several acts of Parliament, and other most authoritative records.

Accordingly Lord Bacon, in his History of Henry VII. written at the express desire of King James, and, as we may well suppose from the rank and judgment of the writer, as well as the extraordinary recommendation which set him on the task, composed on the best materials, has these words. Henry Duke of York was created Prince of Wales, and Earl of Chester and Flint; for the dukedom of Cornwall *devolved* to him by statute*.

It has been already seen that the resolution of the Privy Council, in respect of Prince Charles, was afterwards recognized in the preamble of a statute.

The observation therefore which Lord Coke reports, and which by the by, if it was any

* Bacon's Works, vol. ii. p. 343.

thing more than an *obiter dictum* of counsel, if it was sanctioned by the court, must have been entirely extrajudicial, since it has no perceptible connection with the point that came for decision in the Prince's case, this observation having been made some years before the decision I have referred to, being over-ruled by it, and originally resting on a single circumstance demonstrably the reverse of what was asserted—It cannot be considered as creating any doubt or difficulty in this case, notwithstanding the renowned name under which it is delivered down to posterity.

Lord Coke must have assisted at the argument before the Council. He probably urged his objections, and as his dissent does not appear, it should seem that he was satisfied, upon a further investigation of the matter, that they were not well founded.

If any thing further were wanting to make this a decided point, we have the concurrent

authorities of Selden*, Lord Hale†, and Lord Hardwicke.

Upon this branch of the subject I have no hesitation to repeat, there can be little or no doubt.

The third question is of more immediate moment than either of the two former, and withal more difficult to be determined. Whether or not the King is accountable for the rents and profits of the dukedom of Cornwall received by him during the minority of the Duke.

Upon three different grounds it has been contended that he is not. First, as he is guardian in chivalry, the ducal possessions being originally holden of the crown by that species of tenure, and Parliament not having altered the relation.

Secondly, As guardian of a special kind, possessed of rights anomalous, like the estate and

* Tit. Hon. 754.

† 1 Hist. P. C. 126.

tenure from which this his peculiar character arises.

Thirdly, As *King*, under that branch of the prerogative which relates to the œconomy of the royal family.

I shall exhibit this threefold scheme of reasoning in the best manner I am able, making occasional comments and observations on the several parts of it, and afterwards unfolding the arguments by which it is combated. I shall express the biases and inclination of my mind upon the whole matter shortly and with diffidence, it being rather my aim to bring before the view of the reader, such materials as may assist him in forming a judgment, than to lead him to the adoption of any opinion of mine upon the subject. A concise preliminary exposition seems necessary to the first argument.

In this kingdom tenure is an inseparable concomitant to estate, not by any necessary or natural connection between the two things, as I think

think I shall be able to evince, but merely on this account—because it is so established. Tenure seems to be the growth of the feudal system, for it was unknown to the laws of Rome. *When* this system was introduced into this country, in what form, with what incidents and properties, at what precise time it become universal; these are points upon which antiquaries and lawyers are much divided, and with which we have no immediate concern in this place. Certain it is, that soon after the conquest it obtained a full and complete establishment, and with it the maxim which has continued down to this day, that all lands, the property of the subject, are holden of some superior, mediately or immediately of the King. But different services gave rise to different denominations of tenure, which were commented upon with much subtilty by the lawyers of those times, and distinguished by a variety of properties and incidents. The tenures by which *freemen and laymen* held their lands, came to be universally distributed under two general heads. Those which consisted in certain determinate services, were called
focage;

focage ; those which were loose and uncertain, were called knight service.

The latter kind was considered, perhaps, as the most honourable, being of a military complexion, and falling in with the martial genius of the people. Probably too, it was not so burthenfome at its first establishment, as it afterwards proved. Some of our ablest writers are of this opinion, who contend, that its long train of grievous obligations were for the most part the growth of succeeding times, raised on the foundation of subtle constructions and fanciful analogies, by the prolific ingenuity of the Norman lawyers. But however this may be, certain it is, that it soon came to be one of the most fruitful sources of oppression that ever visited a people. It is not necessary to the design of this summary exposition, to state all the grievances which our fathers were condemned to endure, through a series of ages, from the monstrous excrescences which grew out of the tenure by knight service. It is sufficient to mention the guardianship in chivalry. The nature of this

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kind

kind of guardianship is fully opened in a masterly note of Mr. Hargrave, in his edition of Coke on Littleton*. To that I beg leave to refer the reader, for all the points of distinction between it, and the different forms of guardianship existing at this day.

It differed radically and essentially. Whereas every other kind of guardianship is considered both in theory and practical construction, as a trust for the benefit of the minor, this was contrived merely as a source of lucre to the guardian. Accordingly, all other guardians are accountable to the minor for the fruits of his minority. The guardian in chivalry is discharged from all trust, and the consequence of trust, responsibility. He had a right to make a traffic of the marriage of his ward, and was entitled to the fruits of his bargain. The principle of this kind of guardianship, was so avowedly the benefit of the lord, independently of any consideration of the minor, that although a

* Co. Litt. 88. b. N. 11.

female heir was discharged from guardianship, if fourteen years of age, at the death of the ancestor; yet if within that age, the guardianship of the lord was prolonged to the full completion of her sixteenth year. Whereas other guardianships are assigned to persons who are likely from feelings of blood, and other considerations, to act as faithful stewards for their young and infirm charge, the guardian in chivalry might be, and usually was, a person utterly unconnected with his ward, bound to him by no tie, attached to him by no relation, interested in practising every art of extortion, to wring out as much profit as possible from the transient property thrown into his hands. This he might dispose of to the highest bidder, stimulated if possible by still stronger motives to rapacity and plunder.

The tenure in soccage, in the mean time, was free from all these burthens and inconveniences. Besides its original and intrinsic advantage of having all its services certain and determinate, it never came to be mixed with the
tenure

tenure by knight service, in the consequences of guardianship and other grievances.

Guardianship in foccage is regulated according to the primary and natural notion of all guardianship. It is committed with a prudent and mixed solicitude to the next of kin of the minor, to whom the inheritance can never descend; and what more immediately concerns our purpose, the guardian is accountable for every thing received by him in right of his ward. The 12 *Car.* 2. c. 24. couched in very general and comprehensive words, purports the abolition of all military tenures, with all their consequences, and the universal substitution of free and common foccage in their stead.

There are two suppositions under this division of the argument, on which the King is accountable to the Prince of Wales: 1. On the notion that he was not guardian in chivalry before the statute. 2. Should the statute extend to this case?

There

There are a multitude of arguments that would persuade me he was guardian in chivalry. Indeed there would be scarcely any room for doubt, were it not for a very curious statute which leans the other way.

The Parliamentary charter which created the dukedom of Cornwall, has express words of tenure, but does not specify the nature of the tenure.

Mr. Butler, in his masterly deduction,* historical and legal, of the feudal system,† informs us,

* Co. Litt. 191. a. N. 1.

† I refer with pleasure to this excellent note of Mr. Butler. It exhibits, within a narrow compass, a full and distinct view of that intricate and complicated system which was once, as the learned Spelman expresses it, the law of nations in this western world; and from which most of the institutions still prevailing in Europe, derive their origin and character. Law, as opened and illustrated by such men as Mr. B. is far from being that harsh and crabbed science, which it is generally imagined to be. Besides sharpening the understanding, by exercising it on a variety of questions full of curious and ingenious subtilty, it conducts the imagination through a number of entertaining scenes. The laws and politics of the several European

us, that every fief was presumed to be a proper fief, until the contrary was shewn. Though the

European societies, and particularly of our own, are exhibited to us in their first bold and sublime rudeness. We see those institutions which are destined to be one day the grace, ornament, and protection of flourishing and commercial nations, taking their rise among woods and forests; the growth of causes which our ignorance miscalls chance and accident, appearing at first rather to inflame the wild passions of the barbarians whom they sway, than to correct and moderate them, yet amidst the mighty ferment which they produce, still pregnant with the genial seeds of future order and good government. We trace them in their progress of improvement. We observe the various events which contributed to forward or retard it. Jurisprudence thus becomes connected with general history, and the contemplations of the statesman associated with the studies of the lawyer. Upon the whole, by such liberal enquiries our minds are enlarged, and our best sentiments improved. We contract a reverence for antiquity, and are inspired with an honest prejudice in favour of the laws and institutions of our country. Something like the sanctity of religion is diffused over them, to our thoughts and feelings, and patriotism, in conformity to the language of ancient Rome, becomes a branch of piety, a sentiment of devotion.

The flippancy of modern philosophy will ridicule this as bigotry and enthusiasm; but the laugh and the sneer will not hurt us, while we reflect, that if we are bigots, we are bigots of the sect of Lord Somers, Sir J. Jekyll, Lord Hardwick, and the other sages and magistrates who have adorned this island.

proper

proper fief, strictly and emphatically so called, seems never to have obtained in this country; yet that which was most analagous to it was the tenure by knight service. The same reasons that probably introduced the rule of presumption, in respect of proper fiefs, seem to hold in favour of that tenure. It was the tenure more immediately connected with the defence of the realm, and all the purposes of war. As therefore the charter is silent as to the species of tenure, tenure in chivalry must be supposed to have been intended.

Besides, though several modern writers of eminence do not seem inclined to admit the ignoble lineage anciently ascribed to the tenure in socage; and though the large immunities and privileges belonging to that class of tenants support their hypothesis; yet in a martial age, a military character must have appeared most suitable to the person of the heir apparent of the crown. An immunity from war and service, would have been considered rather as a badge of disgrace inflicted, than a privilege conferred upon him;

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and

and this may well furnish a presumption, that the tenure annexed to the ample and splendid patrimony with which he was invested, was of a military complexion.

If, upon a *melius inquirendum*, a tenure be found of the King *ut de manerio per quæ servitia juratores ignorant*, it shall be taken for knight service.*

When an abbot and convent, holding in Frankalmagne, alien to a secular man, the secular man shall hold by fealty.†

And it is to be observed, that when the law createth any new tenure, it is the lowest, viz, tenure in socage.‡

But the reader will distinguish between the rule that governs the creation of a new tenure, and the rule of presumption respecting an unknown existing tenure.

* Co. Litt. 77. b. † Litt. f. 139.

‡ Co. Litt. 98. a.

The ducal possessions of Cornwall constitute an honour, conferring the rank, title, and privileges of Duke on their possessor, and inseparably annexed to them.—It may not be improper here to enter into a short disquisition upon the nature of land honours, of which the dukedom of Cornwall is among the few remaining ones. The reader will perceive, as he goes along, that this digression is not a ramble.

The subject has been handled by a number of learned writers. Some difference of opinion prevails among them. But the notions of Madox are now, if I mistake not, most generally assented to.

Madox is a writer of copious, and almost exuberant, erudition. He every where bottoms himself upon original monuments, rolls, and records. He was not one of those that glanced over the surface of a subject. He removed the rubbish of antiquity, he visited the roots, he left no source of knowledge unexplored. But his manner is perplexed and involved.

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volved.



volved. His learning scattered over a number of folio pages without order and method. His style rude and uncouth, beyond the rudeness and uncouthness of our most early writers. He has all the pedantry of Coke—little of the vigour and massiness of his understanding. I am indebted for my materials to him, but I have endeavoured to compress what he has dilated; to methodize what he has left unarranged; to make clear what he has obscured by his perplexed and desultory erudition.

Without aiming at definitions, which such a subject scarcely admits of, these, as far as I can gather from the observations of Madox, and the multiplicity of cases and precedents which he has collected, are among the chief essential properties of a land honour: 1. It cleaves to land. 2. It must be holden immediately of the King. 3. It must have comprized two knights' fees at least. 4. It must have been denominated an honour, or barony, or had baronial service annexed to it in the terms of the grant.

In

In the case of the manor of Petworth, 10
*Jac.** I find it laid down *per totam curiam*.—The
 King cannot create an honour without an act
 of Parliament. This is confirmed by the asser-
 tion that the King cannot make a chase a forest.

The principal proposition is not supported by
 any thing I have been able to meet with else-
 where, is contradicted by most of the cases in
 Madox, where the grant of the honour appears
 to issue solely and entirely from the King, and
 seems inconsistent with his well known ascer-
 tained prerogative of calling whomsoever he, in
 his royal discretion, thinks fit to advise him in
 his house of Peers.

The second proposition introduced by way of
 illustration, is likewise unfounded, as the reader
 will find, if he takes the trouble of consulting
 4 *Inst.* 314.

An honour conferred on its possessor the pri-
 vilege of one of the peers of the King's court.
Pares curiæ.

* 1 Bul. p. 196.

An honour, in its most comprehensive sense, describes the titled possessions of every peer. In a stricter and specific import, it is confined to the privileged estate of an Earl. In the same manner, Baron is a general name for all the orders of the nobility. It is likewise the peculiar title of the lowest rank in that illustrious body.

It is evident that all honours were, in their original, of a military character. Baronial service, which was only a larger knight service, was an essential part of their constitution.

Henry I. in the tenth year of his reign, changed the abbey of Ely into a bishoprick. The dignity of Baron was annexed to the episcopal possessions, or in other words, they were created an honour by the charter of erection. It does not appear what services of the shield, or indeed that any were imposed upon them. Yet we find that in the reign of Henry II. the Bishop of Ely stood charged to the crown for knights fees.*

* Mad. Bar. Ang. 28.

12 *Car.* 2. c. 24. provides that nothing in that act contained shall affect any title of honour, feudal or other, by which any person hath, or may have, right to sit in the Lords House of Parliament, as to his or their title of honour, or sitting in Parliament, and the privilege belonging to them as peers.

The abolition of military service, it was apprehended, would annihilate all honours by tenure. At least I can conceive no other meaning or application in this saving proviso.

Tenure by barony was of the same nature, in general, with tenure by chivalry. It drew after it wardship and other incidents to a knight's fee.*

In process of time, a number of honours came by different ways into the hands of the crown. Some of these used to be committed to the care and inspection of certain persons, who accounted in the King's exchequer for the issues and profits

* *Mad. Bar. Ang.* 60.

of them. Others were let to farm at a certain rent—in general, I imagine, for terms of years. But there are instances in Madox, of fee-tail and fee-simple estates thus created in honours belonging to the crown. The two most remarkable are these :

King John granted the whole honour of Berkhamstede, with the castle of Berkhamstede, and the *services of the knights*, and all other pertinencies to G. Fitz Pierre, to be holden at fee-farm, of the King and his heirs by G. Fitz Pierre, and the heirs which shall issue from him and Evelina his wife, and for want of such issue to be holden by the other heirs of G. Fitz Pierre, rendering to the King and his heirs for the said honour 100l.

Henry III. granted the manor of Knareburgh, with the castle and honour, and knights fees, and all other appurtenances, to H. de Burgh, and Margaret his wife, in tail special, rendering to the King and his heirs yearly 100l. *for all services and demands.**

* Ib, 88, 89.

On the face of these cases the argument from the dutchy of Cornwall's being an honour, seems to be somewhat shaken. There are three different suppositions that solve the difficulty.

I. These farmers of the King's honours, though frequently invested even with fee-simple estates, yet not standing in the relation of military tenants, were not raised to the rank and privileges which followed the nature of pure original honours. I confess, I am not prepared to decide upon so nice a question, which, besides, is rather foreign to the main design of this dissertation.

II. Though in the first grant all the knights services are made over to the King's grantee, and in the second a certain rent is reserved, with a discharge from all other services and demands; yet the cases may be understood in this manner. The rent reserved fastens on the demesne lands of the honour. To this the acquittance applies. The grantees are made immediate lords of the knights fees belonging to the honour. But this
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does not discharge them in relation to the King. Knight service, by the laws of the land, could only be performed in the King's armies ; so that whatever service of that kind was performed to the King's grantees, it could only be in their capacity of great officers, or leaders of bands under the banners of their Sovereign. In fine, the honours are put precisely on the same footing as they were upon before their escheat to the crown, only that a certain fee-farm rent is reserved out of the demesnes, and various issues and profits made over to the grantees. This doctrine receives great countenance from several passages in Madox, and a number of cases which he recites. The committees of the King's honours often account for the rents and issues of the manors respectively belonging to them. But it appears that the services of the knights were notwithstanding due. They were to be performed in the field, and therefore did not come under the inspection of the exchequer. Yet when commuted for escuage money, or satisfied by fines, they form separate items in the reckoning. The King's ordinary farmers too, who

who were in those times considered as little above stewards or bailiffs to their lord, at least when only possessed of terms of years in their farms, and who are therefore generally confounded by Madox with the committees above-mentioned—These often accounted for what is called in the rolls of the exchequer the farm of the honour. Yet they used sometimes to pay escuage, and at all times the services of the knights fees appear to have been concurrently due. If this were the case, although such grantees of the crown were considered as really tenants of honours, with all the privileges of such baronial possessions; yet the argument affecting the Duke of Cornwall is not weakened by the special reservation of rent, as the lords must have been still regarded the representatives of all the knights fees holden of them, and answerable for the services of their tenants, according to the original constitution of honours.

III. Such special reservation may be considered in the nature of escuage money a commutation

tation for military service, as well as a compensation for the enjoyment of the demefne lands and other rights belonging to the honour, the question still recurring whether the military tenure thus sinking into foccage, (as all escuage certain most assuredly is,) the privileges growing from the military relation did not cease together with it.

Thus far the current of argument runs, with little interruption, in favour of the military tenure ascribed to the dutchy of Cornwall. I come now to the act of Parliament which leans the other way*. It should be remarked, that the King's son and heir apparent, Prince Edward, was just two years old when this statute was made. I shall lay before the reader the most material parts of it, concluding with a few observations, upon which I shall leave him to form his judgment.—“The King considering that his said first-begotten son, at the time of his birth, is Duke of Cornwall, and ought of right to have livery of the said dutchy, and of all

* 34 *Hen. 6.* A. D. 1455. Roll. Parl. 43.

honours,

honours, lordships, &c. delivereth to the said Prince the dutchy of Cornwall, and all honours, &c. and that the said Prince here enjoy and possess all the premises as largely as Prince Edward, son of King Edward, his progenitor.

The Prince is to sojourn and diet in the King's household till the age of 14. The King for the diet to have all that shall remain due from the said dutchy from 12 Nov. till the Prince arrives at the age of 14.

Reservation of an annual pension of 1051 marks to the Prince till he is 8 years old; of 2000 from that to his 14th year.

The sums received by the King to be expended in his household, and to no other purpose.

All assignments of the premises void.

Upon this act it may be remarked, 1. That if the King was guardian in chivalry, it was
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unnecessary as far as it grants, and encroaching as far as it restrains. 2. The time of the King's enjoyment of the premises is limited to the Prince's attaining the age of fourteen, precisely the age at which guardianship in foccage ends. 3. All assignments are declared void. Now guardian in chivalry might assign the custody of the infant's lands, as well as of his person.

Supposing the tenure of the dutchy to have been military before the 12th of Charles II. Is it changed by that act?

We have no concern here with any extraordinary guardianship which may be supposed vested in the King as a branch of his prerogative royal. The question is, about the tenure of the dutchy, and the guardianship springing from it.

I see nothing in the statute which protects the dutchy of Cornwall. I need not recite the words of a statute so well known; but, as it has often been observed, it labours with a vicious exuberance
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of words to complete its object of abolition and eradication. The legislature seems to have been apprehensive of evasions and exceptions, and in its ardour to guard against them, falls into palpable absurdities.

There is only a single phrase which can be laid hold on by the most subtle advocate for the exception of the Duke of Cornwall.*

“ And all tenures of any honours, &c. lands, tenements, or hereditaments, or any estate of any inheritance *at the common law*. &c.”

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* When I wrote the above, I forgot the proposition which is ascribed to the Attorney General, that peerage tenure was exempted from the statute. I suppose, by peerage tenure is meant what Madox and other writers call tenure by barony. This was only a branch of the tenure in chivalry. As the *kind* is abolished in the most emphatic and comprehensive terms which language can suggest, the *sort* must be supposed to be taken away likewise, unless there is some special proviso to protect it. Now I can find none which appears calculated for that purpose. There is indeed a clause respecting honours, the substance of which I have transcribed in a former page. But by the very words of it, it does not save the tenure of the honours, but only the privileges, which being originally founded

I do not know whether it may not be contended that the words *at the common law* limit the universality of the other expressions, and protect an inheritance which is not *at the common law*.

I do not think there is much in the objection, but I suggest it for the judgment of the reader.

In the famous case relative to the education and marriage of the royal family, I find these words, as delivered by Baron Price:—It is very clear the Prince is a subject, and the Prince founded upon it, might be considered as destroyed with it. If the tenure itself had been saved, there would have been no necessity for such a proviso in favour of the privileges which it conferred. But the truth apparently is, that the legislature felt it took away the tenure, and therefore thought it fit to guard against the conclusion which might be drawn from such an abolition, that the rank, title, and other circumstances of the honours were intended to be taken away likewise. If, however, the Attorney General really argued as he is represented to have done, I must qualify the general proposition in the text, that no other part of the act but what I have stated gives a hold to the advocates for the exception of the duchy of Cornwall.

held

held by tenure at first, and the tenure is taken away by the act of 12 *Car.* 2.

All the other judges, except one, denied that the Prince was within the words of the act which enable a father to appoint by will guardians for his children; but I do not find this proposition of Price specifically controverted. Some of them make use of very general expressions; but I think it pretty clear that they were not intended to apply to any consideration of tenure, or any rights founded upon that consideration. King C. J. This guardianship (the guardianship of his children claimed by the King) is not a guardianship by tenure, so is not within the 12 *Car.* 2. It should seem then that every guardianship by tenure came within the regulations of the act.

I shall have occasion to enter more particularly into the contents of this celebrated case under a subsequent branch of this argument. But I would impress upon the mind of the

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reader this distinction—Any rights of guardianship which the King possessed over the dutchy of Cornwall as the fruits of tenure, are, I think, affected by the 12 *Car.* 2. in the same manner as those which he exercised over any other of his feudal dependencies.

With respect to guardianship by prerogative—this will be considered more fully hereafter. It stands upon grounds entirely distinct from tenure, or any thing connected with tenure; it forms a part of the public policy of the country, derived out of public reasons, and directed to public ends.

I come now to the second head of argument, whereby it has been attempted to be proved, that the King is not accountable. I confess I do not attach much weight to the scheme of reasoning that falls under this division of the subject. The author of it, as far as I am informed, is a gentleman of great acuteness and learning, whose name, if I thought myself at liberty

liberty to mention it, would be a considerable ornament to these pages. I heard him support it with much ingenuity and eloquence, yet I think it is very open to confutation.

He not only admitted, but actually contended, that as well before as since the statute, *Car. 2.* the King was not guardian in chivalry. He commented on the anomalous form of the inheritance created by the charter of *Edw. 3.* and inferred, that the tenure which clung to it must be correspondently anomalous. On these grounds he protested against every argument by parity of reason from the ordinary kinds of inheritance, and ordinary kinds of tenure. He looked upon the guardianship of the King in this case as a thing quite *sui generis*, out of the operation, as well of the common law, as of the statute; and thence concluded, I confess I could not see by what intermediate list of argumentation, that the King must needs not be subject to account.

I took the liberty at the time of observing, that his premises appeared to me unfounded; and even if they were true, that they would furnish no conclusion to the purpose.

It must be observed, that guardianship is correspondent to tenure, not to estate. This the argument seems to admit, and consequently applies itself to prove the anomalous tenure.

Now in my view of the subject, the nature of the estate can never lay a ground for arguing as to the nature of the tenure. The connection between estate and tenure is quite arbitrary, and of positive institution. Tenure is a feudal superinduction upon estate. Estate is ownership varied by different degrees of duration, and different tracks of descent. In its general abstract notion, it is inseparable from the idea of property. Tenure consists in the rendering of some service to some superior. Before the feudal times it was unknown; which could not be, if it lay within the comprehension of the idea
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of estate. If an anomalous inheritance argued an anomalous tenure, an ordinary inheritance would argue an ordinary tenure, and estate or inheritance in the abstract would suggest tenure in the abstract; which the least reflection will persuade any one is not the case.

Each of the ordinary kinds of tenure can mould and adapt itself with equal facility to every conceivable distinction, or varying shade of estate. There is no repugnancy, no suitableness in one more than in the other. However anomalous the inheritance of the Dukes of Cornwall, it cannot be pretended that it differs more from an ordinary estate in fee simple, than does an ordinary estate for life. Yet there is no more difficulty in conceiving a tenant in chivalry, or in soccage, for life, than one in fee simple; or in fee simple, than one for life.

It is incumbent upon any one who insists on the theory which I am combating, to shew either that the anomalous estate necessarily infers an

anomalous tenure, or by sufficient authorities to evince, that in this particular case such an anomalous tenure has been recognized. Now what trace is there in any of our books of such an anomalous tenure?

Littleton expressly says, that all manner of tenures which are not tenures by knight service, are called tenures in socage*.

There are several expressions in Coke, and other writers, to the same purpose. They must be understood, indeed, with some restriction, as confined to lay and free tenures; but thus qualified they are, as far as I can find, strictly and literally true.

Admitting, however, for the sake of argument, the alledged irregularity of tenure, and that consequently the royal guardianship is strictly neither chivalry nor socage; yet by what logic does it follow that it is *therefore* exempted from account?

* §. 119.

As far as the question of account is concerned, it is evident that it cannot be anomalous. We must decide either in the affirmative or the negative, and so far ascribe to the guardianship in question either a military or fockage character.

Because it is strictly neither chivalry nor fockage, therefore it is chivalry, as far as we are interested in the discussion.

Thus stands the argument, stripped of all superfluous phraseology.

I do not mean to deny that a kind of guardianship, distinguishable from the two above-mentioned, may be privileged like the ancient guardianship in chivalry. The right of the legislature is unquestionable, such an exception may be proper in certain circumstances, upon special reasons. We know that prescription has been allowed to create variations from the ordinary rules of the crown law. By custom, the

heir of him that holdeth in foccage may be inward*.

But the argument I am canvassing lays before us only these two circumstances. 1. The guardianship in question is not chivalry. 2. It is not foccage.

It must fall then, till something further appears under the general principle respecting guardianship; since the presumption is always in favour of the general principle, against the particular exception.

What is the general principle?

There are various kinds of guardianship known in our law, besides the two I have taken notice of.

All (I speak of guardianships which private persons may exercise) are subject to account. There is a remarkable case in Littleton*, illus-

* Co. Litt. 76, 2.

trative of the rule. Guardian in chivalry disparages his ward. Next of kin enters. He shall be accountable to the infant.

In trust for the ward, and consequently answerable to the ward, is implied in the very notion of guardianship.

Guardianship in chivalry is an anomaly in jurisprudence—the barbarous growth of barbarous times: one of the most grinding oppressions which a people ever endured.

Ad tuendum eum qui per se ipse defendere nequit, enters into the definition of the Roman law, a code of jurisprudence which for the luminous method that runs through it, the accuracy of its definitions, and distinctions, the general equity of its principles and rules, well deserves the attention of every student. Lord Mansfield used to recommend the study of it as a preliminary to the study of our common law; and no doubt that illustrious magistrate was in

* S. 108.

a great measure indebted to it, for that clearness, that order, that arrangement, that good sense, that freedom from thorny technicalities, and abstruse injustice, which so eminently distinguish his determinations.

Hæc verba, says Vinnius, commenting on the above-recited part of Justinian's definition, finem tutelæ indicant, & simul officium tutoris, nam ut tutela pupillorum gratiâ constituta est, ita et ad utilitatem eorum tota referenda.*

The generality of guardians were obliged to give security for the faithful administration of the estates of their wards †.

It has been observed, that the King is guardian, although he has what the extreme jealousy of our law might suspect to be an interest in the death of his ward—An immediate reversion of his estate where he happens to be an only son. Therefore not foccage.

* 1. Inst. T. 13. Vin. Com.

† Ib. T. 24.

1. I have

1. I have already shewn, that *not foccage* does not conclude upon the question. It should seem a strange inference—because the law has honoured the sovereign with extraordinary confidence, in committing to him the person of the Prince, therefore he is not to account to him for the issues of his estate.

2. It does not appear that reversion, remainder, or escheat, were ever considered on the same footing with descent; and though the reason may be alledged to be the same, the question is not about the reason, but the law. A disposition has appeared in our magistrates to circumscribe a principle, which they were pleased to call the suggestion of barbarous suspicions—none to extend it.

It is a matter of doubt with me, whether any other circumstance, besides the possibility of *inberiting* the minor's estate, disqualifies the next of kin from being guardian in foccage. This I do not assert positively, but I find no trace of the contrary doctrine. Nor is the rule that ex-
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cludes the condition of heirship, without some restrictions growing out of cases peculiarly circumstanced. Where lands descend to the infant both *ex parte paternâ*, & *ex parte maternâ*, so that it is impossible to find any next of kin incapable of inheriting, the next of kin on either side first seizing, the infant is entitled to the custody of his person, &c. See another case put by Sergeant Hawkins, with the observations of Mr. Hargrave (*Co. Litt.* 87. b. n. 2.) Granting however that a reversion, or remainder, or feignory, with title of escheat annexed to it, is a bar to soccage guardianship, considered as the sole ground of claim in the next of kin; yet a father may be guardian in soccage in consequence of another title which he has to the guardianship of the heir affected by a particular rule. No interest or possibility is stated as a preclusion of guardianship by nature which belongs to a certain description of ancestors, and in a pre-eminent degree to the father. Now where the titles of soccage and natural guardianship concur, for the benefit of the infant,

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the former always supersedes the latter. Ib. 88. b.

3. The law constantly derogated from a rule, rather than take a child out of the custody of the father. His claims superseded those of the lord, even in the rigour of the feudal institutions. Though he cannot inherit immediately, he can inherit indirectly. This is a good bar to the guardianship of a collateral relation—none to that of a father.

I have taken notice of a remarkable passage in Coke, where it is said that prescription may subject the heir of a tenant in soccage to the chivalerian guardianship of the lord.

I suppose no claim on the ground of prescription will be made in this case, but should there, I observe, 1. The creation of the estate is within the time of legal memory. 2. Not only is tenure in chivalry taken away by 12 *Car.* 2. and thereby the whole system of guardianship corresponding to it; but there are these sweeping
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ing words in the act—" All wardships, &c. by reason of *any tenure* of the King's Majesty, &c. to be taken away and discharged, any law, statute, *custom*, or *usage*, to the contrary notwithstanding."

Upon these two branches of argument I repeat what I have already observed.

The act of Henry VI. makes it extremely doubtful to my mind, whether before the statute *Car. 2.* the royal guardianship over the duchy of Cornwall was guardianship in chivalry.

Supposing it to have been so, I have very little doubt but the statute extends to it.

Looking upon it as guardianship of a military character, arising either from an anomalous tenure, or from usage, affecting a common socage tenure, or from any principle which has tenure in any form for its foundation,—I conceive it to be within the provisions and regulations of the Parliament. *Car. 2.*

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I promised to deliver myself shortly, and perhaps the brevity may take away from the appearance of diffidence. But what I have said is with all due deference and submission to better informed judgments. I state what I appear to myself to have learned from the sources of knowledge I have consulted; but perhaps those sources I have not sufficiently explored, and there may be many more which I have not visited at all.

There is a third ground upon which the right of the King may be maintained, as a branch of his prerogative royal, by which he exercises a special peculiar dominion over the rights, interests, and concerns of his family.

The principle of this argument is, as in the former, an anomalous guardianship belonging to the Sovereign; but the ground on which the anomaly is contended for, is different—Peculiarities of tenure are out of the question. Resort is had to very high grounds in the law of England to a branch of constitutional polity, the precise
extent

extent and circumstance of which it is difficult to ascertain. A man whose acuteness and erudition abundantly qualified him for any course of research, however abstruse or delicate, after a masterly disquisition upon the doctrine of guardianship, applicable to private individuals, declines entering upon that part of the subject which relates to the royal family, as from its dignity and importance not proper to be handled without better materials than what the learned writer professes to have met with. After this admonition to caution and diffidence, coming from so high an authority, it cannot be expected that I should undertake for more than just to open some general grounds upon the subject, and bring into one view what can be obtained of any importance, out of the sources of information referred to by the admonisher himself. *

The King, as *King*, in right of his royal prerogative, is a guardian of a particular kind, invested with ampler powers, and having a wider circle of persons, subjects to his superintend-

* Co. Litt. 89. a. N. 16. 133. b. n. 1.

ency,

ency, than any private individual, however eminent or privileged. If we seek for the reasons of this prerogative, we shall find them in the deep interest which the public has in the right behaviour and demeanour of every member of the royal family. This has made it proper to subject them to an extraordinary œconomy. As they possess a supereminent share of dignity, as they are clothed with the highest honours and privileges, as most of them are endowed with fair portions and patrimonies by the liberality of the public, they cannot complain, if, in some respects, they are under greater controul than other individuals in the nation.

A question arose in the year 1717, whether the King had the education of his grand-children during their infancy, and the approbation of their marriages when grown to the years of maturity.* The Judges were solemnly consulted, The matter was argued by them *seriatim*. Ten out of the whole number were decidedly in favour

* Fortesc. Rep. 401.

of the royal prerogative, as to both the points that were referred to their judgment. The dissentient two, while they gave their opinion absolutely and unequivocally in favour of the father upon the matter of education, acknowledged a superintending and controuling right in the crown, with respect to the question of marriage. The ten judges founded themselves entirely upon the extraordinary rights of domestic regulation vested in the king, as a branch of his prerogative-rights standing upon public reasons, which were not to be measured by the narrow standard of arguments and analogies, drawn from the dispositions of law in respect of private families.

Fortescue Aland, then Baron of the Exchequer, and the reporter of the whole conference, represents himself as arguing in this manner:—"This subject, touching the power of a grandfather, may be treated either as a public or private right. It has been treated of pretty much as a private right, by the two Judges that differ, and by the counsel for the Prince of Wales; which I think is an error
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in the foundation of their argument ; for it ought manifestly to be treated as *jus publicum*, such a right as our law books express it to be, *quod ad statum reipublicæ spectat*, and that makes it the King's prerogative, and that is the King's inheritance, *as King of this realm*, which is too great a point to be governed by the narrow rules of private property, &c." He then proceeds to set forth the eminent distinction which the law has always ascribed to the royal family, from which he infers that they must be considered as placed in very different circumstances, and consequently subject to very different regulations, from any other family in the kingdom.

The 12 *Car.* 2. by reducing almost all the tenures of the realm to common soccage, made soccage guardianship nearly universal. As it is the nature of this kind of guardianship to terminate with the minor's arriving at the age of fourteen, it was judged necessary to provide some means of prolonging the superintendency and controul in the case of fatherless infants. Accordingly the father is enabled to appoint guar-

dians by will, who shall be invested with all the authority of socage guardians till their ward has completed his twenty-first year.

It was contended that this provision of the statute embraced the royal family, and that therefore the father in whom such a discretionary power was lodged, and not the grandfather whose claims might be superseded, even after the former's decease, was to be considered as the rightful guardian of the royal infants.

Fortescue thus expresses himself upon this argument: "As to what was said in relation to the statute 12 *Car.* 2. c. 24. that the Prince was within that act of Parliament, I deny it to be law, or any thing like it."

It has already appeared that this learned Judge rests his opinion entirely upon the ground of prerogative. He is not to be understood, therefore, as asserting that the tenure of the duchy of Cornwall is protected from the statutes. His proposition, as may be collected from the whole context

context of his reasoning, is substantially this—that the rights with which the laws and constitution have invested the King, as part of that extraordinary œconomy and system of regulations by which they have distinguished the royal family from all other families in the nation—rights of a superior order to the little privileges of individuals, standing upon reasons of state, and to be measured only by the principles of public policy—that these were entirely out of the operation of a statute which was intended only to new model the ordinary civil relations of private life. This is the principle which pervades the reasonings of all the Judges who decided in favour of the crown.

The two who differed from the rest denied the prerogative to the extent contended for. But in no part of their reasonings is the general notion of a prerogative guardianship treated as groundless and chimerical. In 1772* the King's right to order and regulate the affairs of his

* Ann. Reg. for 1772.

family, became the subject of very earnest discussion, on occasion of the celebrated royal marriage act. That such a right existed, within certain bounds, was, I think, generally admitted, though what those bounds were it was not easy to ascertain; and upon this point, therefore, the contention of parties was eager and vehement. The question of education was canvassed only as collateral to that of marriage—this the proposed measure naturally bringing forward as the principal subject of controversy. The royal message which introduced the matter to the consideration of Parliament, asserted a general prerogative of approving the marriages of the royal family, as at all times belonging to the crown upon principles of public policy. The act which was framed in pursuance of this message has a declaratory preamble much to the same effect, although the Judges, upon being consulted in due form by the House of Lords, professed themselves unable to decide the question, as extending beyond the children and grand-children of the reigning Sovereign, and the presumptive heir to the crown in whatever degree of consanguinity,

Within

Within these limits they affirmed the claim of the Sovereign. This apparent variance between the opinion of the Judges, and the preamble alluded to, gave birth to two protests signed by a number of most respectable Peers.—Public documents, which well deserve an attentive perusal, as well for the strength of argument that runs through them, as for the eloquent, animated language in which they are expressed.

The general spirit of the conference in 1717, is favourable to the claim of prerogative in all the extent to which it was carried by the message, and declared by the act. But as the question submitted to the consideration of the Judges related only to certain rights over the grandchildren of the Sovereign—on that alone they gave a formal determination. The disposition, however, sufficiently apparent in the majority of them to give as wide an extent as possible to the prerogative, exposed them to much grave and weighty censure during the disputes that agitated the two Houses of Parliament in 1772. The irregular, extrajudicial manner in which their

opinion had been collected did not pass unobserved. Other strictures were made; but as I have already observed the general principle of a prerogative subsisting in the crown, adapted to certain purposes of domestic requisition—this, I think, was not denied.

The guardianship then of the King is an *extraordinary special guardianship*. It is a branch of his sovereignty—a part of his royal character.—This is the proposition which the present scheme of argument would establish.

It may be asked—What is the inference affecting the question under discussion?

I answer, that it deprives the Prince's advocates of many arguments, and opens a source of reasoning to their antagonists, which they may possibly turn to considerable account.

From all that has been said it seems pretty clear, that unless the King at some time or other was invested with a military guardianship, or a
guardianship

guardianship in the nature of military guardianship, upon every argument resulting from the consideration of tenure, he must be regarded as accountable to the Prince; and further that supposing him privileged from account before the statute *Car. 2.* yet if he was only privileged on principles more or less connected with tenure, that the operation of the statute would be to deprive him of such an exemption.

But though I think every guardianship exonerated from account which the King or subject possessed as *lord*, is taken away by the statute,* I do not consider the *prerogative* as affected. Rights vested in the King as *King*, upon public reasons and for public purposes—These I have the authority of the Judges in 1717 to say, stand precisely as they did before the reign of Charles II.

* I cannot forbear here making an observation which ought regularly to have found its place in a preceding part of this Essay. The first section 12 *Car.* provides in so many words, that the tenure of *honours* should be thenceforward tenure in socage. Nothing can be understood by peerage tenure but the tenure by which honours were holden. Mr. Attorney General must therefore have spoken inadvertently upon this subject, if he spoke as he is represented.

untouched

untouched by the provisions of his Parliament. If, therefore, one of these rights was an exemption from account in respect of the revenues of the dutchy of Cornwall—The royal person is exempted still. On the supposition I have made, the act, *Car. 2.* affords no argument, not even a presumption against the King, because the act has no manner of operation on the guardianship discussed. Thus a statute which would be decisive in favour of the Prince upon any other hypothesis, loses all its force and effect upon this. I do not assert, I would not so much as insinuate, that guardianship by prerogative necessarily imports exemption from account. My proposition only goes thus far, that such a privilege *may* belong to such a guardianship notwithstanding the statute 12 *Car. 2.*

Yet the act of *Hen. 6.* unexplained, has great weight in the case. It goes to shew that whatever be the guardianship of the King, however distinguished, however characterized, exemption from account does not form a part in its composition.

But

But setting this act, and other direct proofs and arguments aside, a prerogative guardianship opens much room for reasonings of another kind. Were the King guardian in chivalry or in focage, we should know precisely and distinctly what were his rights, and what his duties. There are other denominations equally defined. In respect of all these, arguments drawn from the particular circumstances of the case would be impertinent, because they are phrases which always convey the same well-known import, and carry with them the same prescribed extent. But guardianship by prerogative having its root entirely in considerations of policy, and generally appealing to arguments drawn from universal reason and common sense, is peculiarly the subject of equitable construction. Its properties and qualities must in a great measure be determined from the rectitude and justice and propriety of the thing under the given circumstances. Where direct proof is not to be found, where the legislature is silent, and the courts of justice have not pronounced, the result of such reasonings must be the decision of the question.

I sup-

I suppose this blank in the present case, and then I conceive the following argument, urged by the advocates of the crown, not to be without its weight, at least not without its plausibility.

The King, in right of his prerogative royal, has the custody of the ducal possessions of Cornwall during the minority of the Duke. Whether or not he is subject to account, is the question?

The kind of guardianship that is the subject of consideration in this place is not fixed by any settled rules, is not determined by any precise definition. In describing its properties, we must be governed, in a great measure, by the circumstances of the particular case. Let it be considered what the circumstances are in the present instance.

It is admitted as a general rule, that guardians are accountable. The reason is obvious—No provision is made for the interest of the guardian in the original constitution of the estate. He has the administration of the minors property,

perty, merely because the minor cannot administer it himself. The rights of the minor are alone the objects of consideration. There is no equity, no reason in favour of the guardian. Is this argument applicable to the ducal possessions of Cornwall? These originally formed a part of the royal patrimony, and were separated from it without an equivalent. The ancestors of the guardian made a gratuitous donation of the property to which the guardianship attaches. Already is the guardian in this case distinguished from the persons generally acting in that capacity. The donation was gratuitous—then it should be construed in favour of the donor. This equity would require even in the case of a private individual. The grant issues from the crown—An additional reason for construing it most favourably to the party giving. Now what may be fairly and equitably presumed to have been intended by the grant? These two propositions are submitted to the reader:—

1. The donation was intended to answer a special purpose of a public nature.

2. Every

2. Every right, it was intended, should remain with the donor, which it was not necessary for that special purpose should be given to the donee.

The conclusion will be, that if the special avowed purpose does not require that the Duke of Cornwall should be entitled to receive an account of the issues and profits of his estate, he is not so entitled. That the charter confirmed by Parliament which created the dutchy of Cornwall was intended to answer a special purpose of a public nature appears—1. From the introductory part. 2. From the provisions exactly corresponding to the introduction.

It is unequivocally stated that the consideration moving the royal munificence to confer the title and dignity of Duke of Cornwall on the eldest son of the King regnant, and heir apparent of his crowns, was to diffuse a lustre and splendour over a person standing in so intimate a relation to the sovereign, and the commonwealth. A noble inheritance was annexed to
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the title, that the establishment of so high and distinguished a subject might correspond to the honours which he bore, and the prospects which were opened to him.—“ We have given and granted, &c. to the same our son, &c. that he the state and honour of the said Duke might uphold according to the nobility of his stock, and the charges and burthens thereof the better uphold.”

The provisions were suited to the preamble. The inheritance is not limited with a reference merely to the blood of the grantee. This would have been the case, if to gratify the grantee, to confer a benefit upon him considered in the light of a private individual, had been the paramount consideration of the grant. But as reasons of a public nature prompted the liberality of the crown, the same reasons circumscribe its extent. A person standing in a given degree of relationship to the last Duke, and the original grantee, is entitled under the grant, but not merely on account of the relationship. For individuals in an equal degree related are excluded.

cluded. A specified propinquity to the royal person is requisite to consummate his title. By this propinquity alone he appeared to interest the public honour, that a liberal provision should be settled upon him. Whoever therefore does not stand in that precise propinquity, as he is out of the reason of the grant, so is he excluded from the effect.

2nd proposition—Every right not interfering with the specified purpose, the sacrifice of which was not necessary to carry it into effect, was intended to be retained by the crown.

The truth of this proposition is evident from the extraordinary clause of reversion inserted into the charter. The anomalous limitations affecting the duchy of Cornwall have been commented upon. It cannot be imagined, that the authority of Parliament would have been called in to sanction wide departures from fundamental rules and principles of the common law, unless the attainment of some special object had been proposed by these irregularities. In

truth, the irregularities naturally flow from the two-fold purpose in contemplation. 1. To limit the inheritance to such persons as from their pre-eminent character and situation seemed entitled to a liberal provision in their favour. 2. To prevent the crown from suffering by its liberality further than the specified principle of public policy made it necessary. Accordingly, the anomalous clause above-mentioned was devised. It is conceived that this clause, fairly and equitably construed, warrants the proposition which it is brought to support.

The question suggested by the hypothetical part of the conclusion is, whether it is necessary to carry into effect the purpose of the royal donation, that the Duke of Cornwall should be entitled to the accumulated profits of his minority. From the account which has been deduced of this purpose, it must appear that it is not necessary. When the Duke has passed the time of infancy, he is entitled to a full and complete enjoyment of the ducal possessions. He cannot otherwise, agreeably to the expref-

sions of the charter, uphold his state and honour according to the nobility of his stock. As the Parliament judged the provision it made necessary, so may we suppose it to have thought it sufficient. Whether or not this provision is sufficient at present is not the question. It was deemed sufficient at the time it was settled; otherwise it is fair to argue the legislature would have increased it. As it was thought sufficient to answer the proposed end, and as there was no intention to go beyond the proposed end, but rather to suit the grant to it with a rigorous œconomy, often in violation of the best ascertained principles of law; we may conclude, that the extraordinary revenue in question was not intended to accumulate in the occupation of the crown during the minority, but merely to answer such charges as the purpose of the donation requires should be satisfied. This purpose is accomplished, if the Duke has a maintenance and establishment allotted to him suitable to his rank. Whatever remains after the expences of education, and every other necessary disbursement, may be fairly allowed to the crown, upon
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the principle that accounting for it is not necessary to the end of the donation, and that whatever is not so necessary, of right belongs to the heirs and successors of the original grantor.

If the crown were made accountable, upon the general principle that governs the equity of the court of chancery in such cases, it would not be allowed to set off the expences of maintenance and education. This seems reasonable enough in respect of private families, where there is no occasion for large disbursements, where the father might justly be charged with a blameable indulgence to the pride and vanity of the young heir, if he allowed him a splendid establishment, a numerous attendance ; yet these are necessary expences about the person of the King's eldest son, the heir apparent of his crown and dignity. The court must either allow these expences, or not. If it does, it departs from a general principle, and thus recognizes the anomalous circumstances of the case. If not, it hazards the possibility of a mean and unworthy establishment, a neglected education, in an in-

stance where the honour of the realm must suffer by the one, and the dearest interests of the commonwealth be mainly endangered, if not wholly sacrificed by the other. This must be the consequence; since there can be no possible method of compelling the crown to a suitable expence, where it will not be permitted to set off that expence against the claims of the minor. Such an effect must mar, if not entirely defeat the purpose of the legislature in the splendid provision it has made. The heir would be subject to a mean and niggardly allowance during his nonage, whilst an over-abundance of treasure would pour in upon him as soon as he was of age. He would pass from the extreme of unseemly indigence, to a vicious superfluity. The expressions splendid patrimony, and superfluity of treasure, have reference to what the revenues of the dutchy of Cornwall probably were at the time of the parliamentary settlement. We must carry ourselves back to that period, in order to explore the views and intentions of the legislature then enacting.

Could

Could the act of *Hen. 6.* be got over, I should think the reasoning I have stated not a little forcible and weighty. Even with this difficulty in its way, it appears to me the most plausible that can be urged on that side of the question. At least the ground of prerogative will, I believe, be found more defensible than any which has tenure for its foundation.

It was the original opinion of an eminent barrister, says Mr. Hargrave*, that the administration of the province of Maryland was devolved to the crown during the minority of Lord Baltimore, the lord proprietor. He afterwards retracted this notion, and assented to the infant's right of naming a guardian; the infant being then turned of eighteen. What suggested the first sentiment may perhaps deserve to be considered. The learned barrister must have had in contemplation, it should seem, a guardianship by prerogative, or what was analagous to it. For with respect to this identical government of Maryland, Lord Hardwicke pronounced

* Co. Litt. 89. a. No 16.

that no argument derived from knight service, or tenure *in capite*, was applicable to it since the statute.*

The fourth question is, What course of proceeding lies open to the Prince, for trying his right with the crown?

It has been generally said, a bill in chancery.

Chancery can give no relief against the King, nor direct any act to be done by him, nor make any decree disposing of, or affecting his property; not even in cases where he is a royal trustee.†

The three regular methods of suing the King are, Traverse of office, *monstrans de droit*, and petition.

Traverse of office is out of the question in this case. In every traverse the subject stands in the

* 1 Ves. 449.

† 3 Black. Com. 428. Mitf. Treat. on Plead. in Chan. 30.
situation

situation of defendant. The traverser resists a claim of the crown—does not prefer one of his own. At common law there was no traverse where the King was in possession.* A traverse lays only where a *scire facias* was necessary to carry into effect the office found. A succession of statutes† allow the King's title to be traversed in almost every case. But the first step must be taken by the crown. The very notion of a traverse implies some proceeding which shall be the object of the traverse.

Monstrans de droit. Whether or not this proceeding lay as a remedial instrument in the hands of the subject which might be used independently and exclusively of any previous step on the part of the crown.—This question has been the subject of one of the most memorable controversies that ever divided the sages of Westminster-Hall.‡ L. C. J. Holt, at the head of ten of the Judges, supported the affirmative.

* 4 Co. 54. a. Sadlers' case passim.

† 34 Ed. 3. c. 14. 36 Ed. 3. c. 13. 2 Ed. 6. c. 8.

‡ Bankers' case. St. Tr. v. 11. p. 138.

Lord Keeper Somers,* in one of the most learned and elaborate arguments that ever was applied to

* The reader will, I trust, excuse me if I here interrupt the course of a dry, legal argument, to indulge in those reflections which the name of Lord Somers so naturally excites. At a period like the present, so barren of real greatness, and so fruitful in empirical pretensions, when the old good sense, the plain honesty, the proud surly independence of character, the warm inbred love and reverence for their country, which distinguished Englishmen of better days, are exchanged for fantastical conceits, mean duplicity, creeping servility, and a degenerate apathy in respect of every thing that concerns the public; when men are every day apostatizing from the pure venerable worship of their ancient government; shaking off their allegiance to the God of their fathers, in order to become the slaves of foreign idols and foreign superstitions—Amidst scenes of so melancholy complexion, and still more melancholy augury—it is gratifying to the fancy, reviving to the spirits, and soothing to the heart, to look back on those bright days which ushered in the present century, on the good times of this favoured people. Amidst the group of statesmen, of sages, of magistrates which they exhibit, there is no figure which more strongly engages the eye, none of more comely lineaments, or venerable aspect than that of the great Lord Somers. His character was made up of such excellent ingredients, mixed in such due proportions, and with so kindly an union, that as far as perfection can be pronounced of man, it may fairly be pronounced of him; it was a character in exact sympathy and conformity with the government of which it was the strength, the ornament, and the pride. It was just what the character of an English magistrate and statesman should be; formed on the study

to the canvassing of a legal question, maintained the contrary opinion. It will be proper to give some

study of the English constitution, animated by its spirit, partaking of those various passions, propensities, and principles, which it corrects while it inspires. The sentiments of a republican were at his *heart*, whilst his *understanding* recognized the necessity of a monarchical controul. The rights of the people were the objects of his *warmest affection*; the expediency of a limited prerogative had penetrated into his *inmost conviction*. He *loved* liberty, and *respected* government. He equally supported both; but the one from *feeling*, the other from *duty*. He steadily opposed himself to every attempt against the established church. He looked upon it as an essential part of a great whole, incorporated with the civil constitution, not only by positive law, but still more intimately by time, which by weaving new ties and bands of connection, assimilated the genius of both to each other, and multiplying the principles of coherency and fitness, had made it impossible to shake the church without mainly endangering the state. Besides, as he was not a metaphysical politician, he paid so much respect to the wisdom of his ancestors, as not wantonly to invade an union which they had held inviolable. But whilst he bowed to the dignity of the prelacy, he was far from seconding the bigotry and persecuting spirit which disgraced some of its members. He looked upon the Dissenters as a decent industrious set of men, whose regular persevering habits of œconomy and labour were the sinews of our commerce, and consequently among the main principles of our wealth and prosperity. He considered perhaps even their faults and vices as a good temperament in a government constituted like ours, to manners less harsh and crabbed indeed, but withal of a more pernicious tendency.—Their sourness and severity not an ill corrective

some account of the case that occasioned this celebrated difference.

Charles

corrective to the increasing licentiousness of the times; their parsimony to the luxury and profusion of the higher orders; their leaning in favour of a republican form of government, to the servile sentiments and doctrines which are so apt to obtain currency in courts. I believe, if his history be attentively studied, his politics will be found to be much of the cast and complexion that I have described: I flatter myself at least that I do not draw from fancy. I have compared the invectives of his enemies with the panegyrics of his friends. Amidst the violence and bitterness of party contention, his character was rigorously scrutinized. The most exquisite discernment, the most poignant wit, both sharpened and invigorated by the animosity of faction, were employed in searching for flaws, and exposing them in the most glaring points of view. As an English statesman and magistrate, he is raised in our estimation by the pains that were taken to lower him. Perhaps we should not have seen the exquisite mixture and temperament of his passions and principles, his subtle apprehension of the nature and spirit of our constitution, and the strict conformity to it, which he observed in every part of his life and conduct; at least not painted in such animated colours, and disposed among such a number of agreeing lights, had it not been for the acute and eloquent malice of his enemies. If after having contemplated him as a statesman, keeping every part of our constitution in exact equipoise, at once the champion of the people, and the guardian of the throne, we follow him to the supreme seat of justice—We find him a grave and venerable magistrate, pure like that equity which
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Charles II. as a compensation to those who had suffered by the arbitrary act of shutting up
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he administered, complete master of the laws of his country, illustrating them by his acuteness, and adorning them with his eloquence. If after that we attend him to the senate, he appears the oracle of the highest order in the state, the proposer of the soundest counsels and most salutary measures; persuasive, impassioned, argumentative, according to the subject; awing by the dignity of his manner, and charming by the sweetness of his speech. In private life he gathered about him whatever genius had of the most exalted, conversation most elegant and delightful, wit most happy and accomplished. He was the friend and companion of Swift, Addison, Congreve, and all the other fine writers of the time. By the testimony of those whom party divisions afterwards made his enemies, he shone a wit among the wits, and was not indebted to his consequence in the state, and his rank of Lord Chancellor, for the attention which he engaged, and the pleasure which he inspired. His manners were of the highest polish, his discourse of the most exquisite urbanity. He was not afraid of exposing his reputation to the enquiry of private and familiar acquaintance. He knew how to maintain his dignity without the helps of sullen reserve and solitary stateliness. He did not mistake stiff-necked haughtiness for becoming pride. He did not fly from the ostentation of a public scene to the conversation of parasites and sycophants, to exercise an indolent superiority, and pamper his ears with daily flattery—like those who seem conscious that they are tall only when upon stilts. His private pleasures were as elegant as his public talents were splendid. He lived in the brightest period of English history, which could not boast of any more distinguished ornament

the exchequer, granted to them respectively an annuity charged upon the revenue of the excise. This annuity was for some time regularly paid to them, but in the reign of King William it became considerably in arrear. A *monstrans de droit*, as it was called by Lord Holt (Lord Somers denying that this name properly belonged to the proceeding) was brought before the Barons of the exchequer, by the representative of one of the original annuitants, for a compulsory injunction on the treasury. Upon this arose the great question concerning the appositeness of the remedy. The Barons decided in favour of the proceeding, and gave judgment accordingly.

ment than himself. Such was his fortune and such his virtue. He has delivered down a name to posterity which will be cherished and revered as long as the noblest work of human wisdom, the British Constitution, is understood and admired. Whenever despotism or anarchy triumphs, the memory of him who was equally an enemy to both, will probably be treated with disrespect. But if immortal spirits can be at all affected by the opinions of us short-sighted mortals, Lord Somers will feel rather pride than humiliation from such a destiny. He will lament the folly of his degenerate countrymen, but he will have no cause to grieve that they were no longer capable of perceiving his excellencies, than they were virtuous and free.

A writ

A writ of error was prosecuted before Lord K. Somers, assisted by the Judges of the other courts. All these, except Treby, C. J. of the Common Pleas, concurred with the Barons ; but the Lord Keeper dissenting, and the sole right of adjudication belonging to him, the judgment of the inferior court was reversed. The House of Lords decided with the Exchequer against the Exchequer Chamber.

This is a summary history of the case. The fair inference seems to be, that whatever praise we may bestow on the ingenuity, acuteness, and learning of the Lord Keeper, we must consider the law as on the side of his rival, since such was the ultimate decision of the tribunal having the right to decide. It may not be unacceptable to the reader to have the grounds of the controversy a little opened.

There can be no doubt that a *monstrans de droit*, or a proceeding sometimes called a *monstrans de droit*, was known at the common law. But Lord Somers contended that it was confined
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to a very narrow compass of cases, and was so specially circumstanced as not very properly to receive that name. This course of litigation was open to the subject, when his title, as well as the foundation of the King's claim, appeared upon record. As in case a previous disseizin was found by the same office that recorded a failure of heirs in a deceased tenant of the crown. The same statutes which have extended the remedy by traverse, have enlarged the proceeding by monstrans. But in every case which the legislature takes notice of, as the subject of its provisions, the King is quasi plaintiff, and the subject quasi defendant. The monstrans de droit, which subsists under the operation of statute law, is in substance a plea to repel a claim—never a writ, or bill, or declaration to urge one. So far it agrees with the traverse. Both have reference to a previous proceeding on the part of the crown. They are instruments of defence, accommodated to the different circumstances in which a defendant may be placed. If the record introducing the litigation advances a fact, which it imports the party concerned to dispute ;

dispute; he has recourse to the method of traverse. If a new fact is to be disclosed, in order to defeat the conclusion arising from the allegations on the part of the crown, a *monstrans de droit* is the regular manner of proceeding. On this part of the subject there was, it should seem, no difference of opinion between the Lord Keeper, and the Chief Justice. But the latter affirmed, that distinctly and independently of the enabling statutes above alluded to, a *monstrans de droit* lay at common law as an original process, which the subject might prosecute in certain circumstances. He contended that the subject was not always driven to his petition of right. A petition he likened to a real action at common law, wherein no damages were recoverable—A *monstrans de droit* to a possessory action, in which not only the immediate object of the suit, but damages for the detention, might be obtained. The Lord Keeper maintained generally that there was no method whereby a claim might be preferred against the crown, but petition—that no such proceeding as that described by the C. J. existed at common law—that

monstrans

monstrans de droit was a legislative extension of the narrow defensive remedy before existing, to which a name of subsequent origin had been improperly applied. Such was the controversy between these two great men. I cannot help thinking (though upon a subject of such nice and abstruse erudition it is with great diffidence that I indulge any sentiment) if a monstrans de droit was a regular course of proceeding in the case of the Bankers, the same might be prosecuted in the present case. It is true Lord Holt, in his argument, circumscribes the remedy of monstrans de droit within very narrow bounds. He guards it by very strict limitations: 1. The claim of the subject must be founded on matter of record. But if the letters patent of *Car. 2.* brought the Bankers' case within the terms of this distinction, why should not the act of *Edw. 3.* be equally available to the Prince of Wales? 2. The circumstances of the claim must not import a destruction of the King's title. The pretensions of the Bankers were allowed not to carry such import. It is difficult to distinguish the Prince's claim from these favourable circumstances.

stances. The Bankers, to make use of the words of Lord Somers, set up a title to the inheritance of a part of the excise. The Prince seeks only to recover certain sums of money had and received to his use. 3. The thing sued must not have been turned into a right. Here the Prince's case is more favourable than that of the Bankers. The latter prosecuted a suit, in the nature of a writ of annuity, where the judgment is for the whole of the future inheritance as well as for the arrears. The suit of the former would be analogous to a writ of account, which in its immediate effect can only be retrospective. The judgment directs an enquiry into what is due, and ordains a correspondent payment.

This would certainly be the most expeditious method of trying the litigated point, yet as Lord Holt guarded the remedy in question by limitations of such nice technical import, as he admitted a petition to lie in every case concurrently with it, as the authority of Lord Somers stands against the whole doctrine, and as nothing should be more cautiously avoided than giving

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room for turning the attention of the court from a liberal enquiry into the validity of the claim, to a technical discussion about the form in which it should be brought forward—upon all these considerations a petition perhaps is the mode of proceeding to be advised.

A petition lies for goods as well as for lands.* It lies for a sum of money, for an annuity, &c.†

It was the course of litigation pursued in a multiplicity of cases recited by Lord Somers, many of which bear a very strict analogy to the case of the Prince.‡

The Prince's claim is a proper subject for equity. Matters of account have fallen almost entirely under the equitable jurisdiction of chancery. The writ of account has got into disuse. Where a variety of papers are to be examined, a number of interfering claims to be adjusted, a vast complication of matter to be disentangled,

* Stamf. Prær. 72. Com. Dig. Prær. D.

† L. Somers's Arg.

‡ Ib. passim.

the rules of the common law are too strict for a complete discovery of the truth. The course of proceeding must in a great measure be accommodated to the circumstances of the particular case, which can be done only under the latitudinarian powers of a court of equity.

A *monstrans de droit* could regularly be prosecuted only on the law side of the chancery, or the ordinary legal court of the exchequer.*

It is true the litigation in the present case cannot *originate* under the ordinary form of an English bill. But a petition may conclude with a special prayer, that the King should refer the claim of his petitioner to the equity of his chancellor, and the answer pursuing the special prayer may refer it accordingly. Then the whole question may be tried with little variation, I should think, from the accustomed course of practice.†

* L. Holt's Arg.

† Mitf. Treat. on plead. in Chan. 30. 1 Ves. 445, 446.

A petition may be pursued in any court according to the prayer and the subsequent indorsement.

If the prayer be general, *que le roy luy face droit*, and the answer be accordingly, *soit droit fait al partie*, then the petition shall be delivered to the chancellor, and a commission shall go to find the right of the party—that being found, he is let in to interplead with the King. The chancellor in this case sits in his court of law.

But a special reference to the equity side of the chancery sends it there immediately, and supercedes the necessity of a commission*.

In the same manner it may be sent to the King's Bench or Common Pleas.

A petition has been sometimes to the King in Parliament, and an act has been made in consequence†.

* L. S. Arg. Stamf. Prær. 73.

† Stamf. Prær, 72. Seld. Jud, in Parl, 2.

To the King in his chancery or other court—
This is equivalent it should seem to a special petition.

A special petition in the manner I have before described seems upon the whole the most advisable course of proceeding for the Prince to pursue, supposing him inclined to try his title with the crown, and to be in proper time for so doing. This latter part of the supposition naturally introduces a very material subject of inquiry—How do the statutes of limitation operate upon the case? The phrase Petition of right might suggest a notion that this mode of proceeding stood upon the same grounds as a writ of right, and was governed by the same rule of limitation. On the other hand, the analogy described by Lord Holt between petitions and actions real at common law, might be supposed perhaps to bring them within the predicament of writs of entry—But though a petition of right is sometimes against the King what the two above-mentioned writs are against the subject, may be grounded on the like circumstances

cumstances of title, and be pursued for the same objects of litigation; yet, according to Lord Somers, it is the sole mode of proceeding in all the variety of inferior cases; and though not the sole, yet is a concurrent remedy even in the opinion of Lord Holt, the great advocate for a limited extent to the course of litigation by *monstrans*. Both the writ of right and writ of entry lie only for lands. The former can be brought only by a tenant in fee simple; the latter is confined to the tenant of a freehold. Now a petition may be brought for chattels real, for goods. Lord Holt admitted it would have been a regular proceeding in the case of the Bankers. It may therefore have an annuity for its object. The fair inference from what has been stated is, that a petition of right should be considered only as a general substitute against the King for the immense variety of actions which are open against the subject. The only substitute, according to Lord Somers, concurrent with another mode of proceeding, according to Lord Holt. A petition therefore has no general distinct character belonging to it, but
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in every case corresponds to the particular suit which in similar circumstances between subject and subject would be thought the proper mode of proceeding. The monstrans in the case of the Bankers was considered with reference to the writ of annuity, of which it was alledged to be the substitute in that particular instance against the King. If this is the rule of judgment in respect of the monstrans, supposing it in a prescribed circle of cases to be a concurrent remedy with petition, conformably to the opinion of Lord Holt, it must be so likewise in respect of the petition which upon this supposition would differ only in form, and in the larger extent of its operation. These grounds being laid, the only question that arises is, to what suit against the subject would a petition preferred by the Prince, in pursuance of his supposed claims, correspond, and what is the rule of limitation in respect of such a suit? It is clear that a writ of account is the regular course of proceeding at common law on the part of an aggrieved minor against his guardian. Now the time of limitation by statute

21 *Jac.* 1. c. 16. for this writ (with an exception to the cases of merchants and factors), is six years. It should seem to follow, that the lapse of six years without any proceeding instituted since the title to account arose, would be a good bar to a petition in this case. This is regularly true—But it should be remembered, that a petition specially framed may introduce the litigation into the court of chancery. The statutes of limitation regulate the proceedings of this court, as well as of the courts of law; yet a certain degree of liberality has always prevailed conformable to the nature of an equitable jurisdiction.

The court will direct an account after a great length of time, if no presumption of satisfaction arises from it, and if plaintiff's title was not disclosed to him in due time*.

I have hitherto treated of what may be properly called a course of litigation. A contro-

* 2 *Vez.* 472. *vid.* the language of Lord Hardwicke, *ib.* 483.

verted point with the crown has sometimes been settled in a different way—The twelve Judges have been consulted—and though their determination thus extrajudicially pronounced is not perhaps binding upon any party, yet it has always been submitted to. Indeed the opinion of a large majority is so strong an evidence of the law in the case, that no one, it is to be presumed, will think of prosecuting a claim in opposition to it. It must in general have the effect of a formal sentence.—This prerogative claimed by the crown of extrajudicially consulting the Judges, has at all times been looked upon with an eye of jealousy. It ought certainly to be very sparingly exercised. Yet it is admitted there are cases so peculiarly circumstanced as to warrant this mode of proceeding. Whether that which has been the subject of our enquiries falls under this description, I shall not take upon myself to determine. A wish, however, seems to be pretty general, that the question of right might be tried (if tried at all) without the indecency of a formal litigation between a son and his father, a subject and his sovereign. The mode here mentioned

is sanctioned by the practice of ancient times, and may perhaps be considered as not ill suited to the end proposed*.

These are the arguments and observations which have occurred to me on the four different questions into which the subject of the Prince of Wales's estate naturally branches out. I trust that throughout the whole of this discussion I have rigorously observed the limits which I prescribed to myself at setting out. I have not mixed the spleen of party politics with investigations of sober jurisprudence: I have not taken occasion from a mere forensic argument to betray either my partialities or my aversions.— Amidst the important scenes that have been in constant and busy agitation about us; amidst the momentous interests which have been the subjects of discussion, and, unfortunately for Europe, of something more than discussion; amidst the ferment of inquiry, the acrimony of mutual accusation, the zeal of various friend-

* V. Harg. note. Co. Litt. 110. N. 5.

ships and attachments into which our whole political world has been thrown, it is impossible for any individual, however humble, however remote from the tracks of ambition, or the notice of public men, if endowed with any thing better than a soul of earth, not to feel some inclination of opinion, not to indulge some wish, or harbour some dislike; not to have caught a spark from those flames which have burnt so fiercely in every part of the empire. Neither, perhaps, in a free country as this is, and as it will long continue, *si per illos licet*, if our enemies at home and abroad do not succeed in overthrowing our constitution, and rooting up our laws, is it a crime in even a private person, with diffidence and respect, at once paying homage to the dignity of the Sovereign and the rights of the people, calmly and soberly to offer what appears to him best for the general interest; to praise without adulation, and censure without acrimony. But men of the most approved judgment and mature experience should alone undertake the delicate task of public instruction. Persons

should not mistake a little flippancy of language for knowledge, inclination for capacity, their presumption for their vocation. Not only then from feeling how unreasonable any political reflections would be in a work like the present, but from a deep impression made upon his mind by the foregoing thoughts, the author of these sheets has determined to be silent on every thing that relates to the Prince of Wales's debts, the manner in which they were incurred, the propriety of discharging them, or the best means of doing it without violating the delicacy of the Prince, or unnecessarily loading a generous people. He laments that the same moderation has not been observed by others, that pamphlets written by the most despicable of mankind, exhibiting only the coarsest lineaments of the inimitable originals which they appear to imitate; where low insolence is substituted for the dignity of manly reproach, scurrility for wit, and a constant tasteless straining of expression for real elevation of style; that these should have been read and admired in a country which has been adorned by the writings of a Swift, an Addison, and a Bolingbroke,

lingbroke. This he feels as a disgrace to our taste, as well as an impeachment of our moral and political sentiments. Whether any litigation will be commenced by the Prince against his royal father, or whether any mode will be taken to decide the main question which he has discussed in this Essay, he is entirely ignorant. If the subject should be thought proper for a legal disquisition, he trusts that course of proceeding will be selected which is best adapted to consult the feelings and preserve the dignity of every party concerned, as well as to produce a fair and impartial discussion of the controversy; assured that no longer than the higher powers respect themselves, will the people respect them; and when that respect is gone, the main principle of political subordination is no more.

F I N I S.

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If the subject should be brought forward for a
 legal discussion, he has no doubt of pro-
 ceeding will be to decide the point of law
 to consult the law. The subject is not
 of every party's concern, and it is not
 a fair and impartial discussion of the contro-
 versy; and, indeed, that no longer than the higher
 powers respect themselves, will the people re-
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 a main principle of political submission is no



